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City Club Report on Ballot Measures 61 & 57

City Club of Portland (Portland, Or.)

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A City Club Report on Ballot Measures 61 & 57

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STATE OF OREGON MEASURE 61:

Creates mandatory minimum prison sentences for certain theft, identity theft, forgery, drug, and burglary crimes.

STATE OF OREGON MEASURE 57:

Increases sentences for drug trafficking, theft against elderly and specified repeat property and identity theft crimes; requires addiction treatment for certain specified offenders.

Oregonians will vote on two ballot measures in November designed to increase the level of punishment for drug and property crimes. Measure 61 is an initiative petition that will impose a mandatory prison sentence for a number of property and drug-related crimes, with no possibility of a reduced sentence. Measure 57 is a legislative referral presented to voters as an alternative to Measure 61, which many legislators regarded as too costly and inflexible. Measure 57 increases the sentences for property and drug-related crimes and for identity fraud, establishes mandatory minimum sentences for certain repeat offenses, but also continues to allow some flexibility in sentencing, consistent with sentencing guidelines. Assuming both measures receive a majority of favorable votes, the one with the greater number of "yes" votes will become law.

Because these two measures are in competition, City Club chose to have one research report address both. Your committee has considered the measures primarily with respect to two concerns: their effectiveness in reducing criminal activity and their cost. Both measures will significantly increase the cost of corrections by incarcerating more people. This increase can come only at the expense of other state programs since neither measure provides additional revenue.

Because your committee concluded that Measure 61 would do serious damage to other state programs and that there are less expensive and, at the same time, more effective ways of reducing property and drug-related crimes, **your committee unanimously recommends a "NO" vote on Measure 61.**

Your committee also concluded that Measure 57 is preferable to Measure 61. It would be less expensive and would provide treatment for drug offenses. There is good evidence that treatment can be more effective and cheaper than incarceration in preventing property crimes. Still, the majority found that the share of the state general fund going to the Department of Corrections is already the greatest of any state and concluded that any increase would do significant damage to other state programs. It also found that property crimes are decreasing, so there is no pressing need for this kind of legislation at this time. **The majority recommends a "NO" vote on Measure 57.**

A minority agreed with the Legislature that the electorate will likely want perpetrators to be held accountable and will most likely vote for a measure increasing punishment. Although the minority concluded that both measures are bad policy, voting "no" on Measure 57 may increase the likelihood that Measure 61 will pass. **The minority recommends a "YES" vote on Measure 57.**

City Club members will vote on this report on Friday, October 10, 2008. Until the membership votes, City Club of Portland does not have an official position on this report. The outcome of the vote will be reported in the City Club Bulletin dated Friday, October 24, 2008 and online at www.pdxcityclub.org.

STATE OF OREGON MEASURE 61

Creates mandatory minimum prison sentences for certain theft, identity theft, forgery, drug, and burglary crimes.

At present, property and drug crimes are punished under sentencing guidelines established in 1989. These guidelines set presumptive sentences for crimes based on the seriousness of the crime and the criminal record, if any, of the perpetrator. A judge may decrease the presumptive sentence but bears the burden of proof in justifying such a departure. The assumption behind Measure 61 is that the guidelines are insufficiently strict and fail to require incarceration for crimes that would justify it. An often-cited example is that a person may be convicted of a property crime four times and still be eligible for probation.

Although some committee members were concerned that the current sentencing guidelines might not be sufficiently severe in some cases, your committee nevertheless is unanimous in recommending a "no" vote on Measure 61 for several reasons. Some of those grounds are the same as those the City Club committee urged in 1998 for the defeat of a similar measure (also numbered Measure 61) that would also have increased the length of certain prison sentences. That committee concluded the following: "This measure would increase the sentences for a wide variety of property and person crimes without consideration of the need for additional incarceration...and without consideration of the financial and other resources needed to provide for it." (Because of an Oregon Supreme Court decision concerning the manner in which petition signatures were counted for the former Measure 61, the Secretary of State did not count the votes cast for the measure.) The present Measure 61 would similarly place additional demands on the state budget by causing an estimated 4,000 to 6,000 more prisoners to be housed in Oregon's prison system. The additional funds needed for the increased prison population could be met only by cutting other state services or raising taxes.

Nor does your committee see that there is a crime wave that calls for a radical response such as this measure proposes. The rate of property crime in Oregon, though still high in comparison with other states, has declined sharply in recent years.

To be sure, any crime is one too many, and is shocking and painful to its victim, but the needs of the criminal justice system must be weighed against other important state activities. Your committee is concerned, for example, that Oregon spends a higher percentage of its general funds on corrections than any other state. Meanwhile its support of higher education is among the lowest and it is at the very bottom in the ratio of state police to population. Several states have found that mandatory minimum sentences have led to huge prison populations and have placed such a large demand on state budgets that they have been forced to cut back on other services. They have therefore turned to other, more effective and less expensive ways of dealing with non-violent offenders. Measure 61 would likely make Oregon go through the same costly experience.

Finally, there is good evidence that, for drug crimes, treatment is far more effective than incarceration in terms both of cost and in preventing drug-related crime. The property crime rate has also dropped dramatically in the past two years. Witnesses who testified before your committee attributed this drop largely to Oregon's new law that makes medicines containing pseudoephedrine available only by prescription. In short, it is possible to reduce the crime rate at very little cost to the state by means other than increased incarceration. While incarceration leads to some decline in the crime rate, no evidence presented to your committee indicated that the mandatory minimum sentences provided in Measure 61 would lead to a significant reduction in property and drug crimes.

Your committee unanimously recommends a "NO" vote on Measure 61.

STATE OF OREGON MEASURE 57

Increases sentences for drug trafficking, theft against elderly and specified repeat property and identity theft crimes; requires addiction treatment for certain specified offenders.

Members of the Legislature reacted to Measure 61 in much the same way as this committee—that is, with concern that it would be expensive and divert funds from other important state programs. However, the Legislature concluded that Measure 61 would likely pass given that “get-tough-on-crime” measures generally pass. The Legislature also relied on a poll suggesting that Measure 61 would likely be approved by voters.

The Legislature therefore referred Measure 57 to the voters as an alternative to Measure 61. This alternative measure provides for increased sentences for property crimes and mandatory sentences for certain repeat offenses. Significantly, Measure 57 also provides treatment for drug offenses. The measure also preserves some discretion for judges in deciding punishment, which your committee sees as important in promoting the fair administration of justice in our court system. Measure 57 would cost less and would almost certainly have better success in dealing with drug and drug-induced crimes than Measure 61. However, it would still cost the state a great deal (approximately \$143 million a year after four years), because it would result in an estimated 1600 additional prisoners in the Oregon prison system. Therefore it would, though to a lesser extent than Measure 61, cut into other state programs and services. It should be remembered that many programs and services besides the correctional system have a role in preventing crime.

Your committee thus found itself faced with a strategic dilemma. Although your committee overwhelmingly believes that neither measure would be good for the state, voting “No” on Measure 57 might increase the likelihood that Measure 61 would pass. **The minority recommends a “YES” vote on Measure 57.**

The majority of your committee, after debating the merits of principle versus strategy, decided that, because both measures would be bad policy for the state, it would recommend a “No” vote on both measures. The evidence examined supports the conclusion that long prison sentences for drug crimes and for most property crimes are counter-productive. Incarceration in some cases is certainly appropriate and effective, but it should not be used when there are more effective and cheaper ways of discouraging much of the criminal activity addressed by these two measures.

Incarceration also creates social problems such as the loss of a breadwinner and the separation of parents and children. This is especially true of the incarceration of women, and this measure would increase the number of women in prison. Finally, it seemed unacceptable for the state to allocate still more money to corrections from the limited state General Fund at the expense of other programs.

The majority recommends a “NO” vote on Measure 57.

INTRODUCTION

Ballot Measure 61 will appear on the ballot as follows:

CREATES MANDATORY MINIMUM PRISON SENTENCES FOR CERTAIN THEFT, IDENTITY THEFT, FORGERY, DRUG, AND BURGLARY CRIMES.

RESULT OF "YES" VOTE: "Yes" vote creates mandatory minimum prison sentences for certain crimes, including burglary, forgery, theft, manufacture/delivery of methamphetamine, heroin, cocaine, or methylenedioxymethamphetamine, under specified circumstances.

RESULT OF "NO" VOTE: "No" vote retains current law, which does not require that persons convicted of the crimes specified in the measure serve mandatory minimum prison sentences.

SUMMARY: Measure creates mandatory minimum prison sentences for specified crimes for which current law does not require mandatory minimums. Requires 36-month minimums for identity theft, first degree burglary, and Class A felony manufacture/delivery of methamphetamine, heroin, cocaine, or methylenedioxymethamphetamine; 30-month minimums for Class B felony manufacture/delivery of same specified controlled substances. For offenders with one or more prior felony convictions, or two or more prior misdemeanor convictions, measure requires 18-month minimums for first degree forgery, motor vehicle theft; 14-month minimums for first degree theft, second degree burglary. Prohibits reductions in sentences required by measure. Sentences must be served in state prisons, not in county jails. State must reimburse counties for pretrial incarceration costs for persons sentenced under measure. Other provisions.

Estimate of Financial Impact

The measure will require additional state spending of \$8 million to \$10 million in the first year, \$67 million to \$88 million in the second year, \$122 million to \$178 million in the third year, \$164 million to \$247 million in the fourth year, and \$161 million to \$274 million in each year after that. The measure does not require additional local government spending. The measure will require the state to borrow between \$1.1 billion and \$1.3 billion to build new prisons between 2010 and 2017. The state will repay those amounts plus interest of \$709 million to \$844 million over 25 years. The measure requires state payments to local government of \$2 million to \$5 million in the first year and \$10 million to \$19 million each year after that. The measure does not affect the amount of funds collected for state government.

(The caption and summary were prepared by the attorney general and certified by the secretary of state.)

City Club's Board of Governors chartered this study to analyze Measures 61 and 57 and assist Club members and the public to better understand the implications of the measures and to recommend "yes" or "no" votes. The eleven members of your committee were screened for conflicts of interest and public positions on the subject of the measures. The study was conducted during August and September 2008. Committee members interviewed proponents and opponents of the measures and persons with professional knowledge about the issues raised by the measures. Your committee viewed relevant articles, research reports, past City Club reports and other material.

Ballot Measure 57 will appear on the Ballot as follows:

INCREASES SENTENCES FOR DRUG TRAFFICKING, THEFT AGAINST ELDERLY AND SPECIFIED REPEAT PROPERTY AND IDENTITY THEFT CRIMES; REQUIRES ADDICTION TREATMENT FOR CERTAIN SPECIFIED OFFENDERS.

RESULT OF "YES" VOTE: "Yes" vote increases sentences for drug trafficking (methamphetamine, heroin, "ecstasy," cocaine), theft against elderly and specified repeat and property and identity theft crimes; requires addiction treatment for certain offenders; establishes this measure as alternative to other specified measure on this ballot to impose minimum sentences for listed crimes.

RESULT OF "NO" VOTE: "No" vote retains current laws, which provide lesser sentences for specified crimes and do not require treatment for addicted offenders.

SUMMARY: This measure increases prison sentences for specified drug and property crimes as follows:

- Trafficking of methamphetamine, heroin, "ecstasy," or cocaine: 34-130 months, depending on the quantity of drugs and criminal history;
- Aggravated theft of over \$10,000 where victim is elderly: 16-45 months, depending on criminal history;
- Repeat offenses of identity theft, burglary, theft, robbery, mail theft, forgery, criminal mischief, credit card and check fraud: 18-30 months or 24-36 months, depending on seriousness of crime and number of past convictions.

This measure also requires treatment for certain addicted offenders at risk of reoffending; imposes sanctions for those who refuse treatment. Limits court's ability to reduce sentences. Provides grants to counties for operation of local jails, treatment services, intensive supervision and drug courts.

If this measure passes with more votes than other specified measure on this ballot to impose minimum sentences for listed crimes, this measure controls and other measure will have no effect. If this measure passes with fewer votes than other specified measure on this ballot to impose minimum sentences for listed crimes, this measure will have no effect.

Estimate of Financial Impact

The measure will require additional state spending of \$9 million in the first year, \$74 million in the second year, \$79 million in the third year, \$106 million in the fourth year, and more than \$143 million after that. The measure does not require additional local government spending. The state will borrow \$314 million from 2010 to 2017 to build new prison space. The state will repay those amounts plus interest of \$203 million over 25 years. The measure does not affect the amount of funds collected for state government.

(The caption and summary were prepared by the attorney general and certified by the secretary of state.)

BACKGROUND

EXPLANATION OF MEASURES 61 & 57

Ballot Measure 61 was initiated by Kevin Mannix, a lawyer, former state legislator, and former candidate for governor. It is an attempt to do for property crimes what Measure 11 did for crimes against persons. Measure 57 was referred by the Legislature as an alternative to Measure 61. Many legislators concluded that, although property crimes were often treated too leniently, Measure 61 was too severe, did not allow the possibility of treatment for addiction (a cause of much property crime), and did not allow judges and juries enough flexibility to address individual differences among offenders. There was also concern that Measure 61's cost would result in cuts to other state programs.¹

CRIME AND PUNISHMENT IN RECENT OREGON HISTORY

History since 1989

According to Article I, Section 15 of the Oregon Constitution, "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions, and reformation." Oregon's criminal statutes establish the maximum sentence for each crime, generally by categorizing the crime within a specified class of felony or misdemeanor. The maximum penalties for Class A, B, and C felonies are, respectively, 20, 10 and 5 years. Misdemeanors are limited to one year. Murder and aggravated murder are not classified and are subject to separate sentencing provisions.²

Before 1989, Oregon judges in criminal cases had considerable freedom in assigning punishment. Thus the kind and degree of punishment given for a particular offense might depend on which judge was presiding. Moreover, the actual time served was often less than the sentence pronounced by the judge because the Parole Board could reduce

the sentence for varied reasons, including the problem of overcrowded prisons.³

The disparities in sentencing led the Legislature in 1989 to adopt guidelines for judges to determine the form and level of punishment for criminal acts. These guidelines produced a matrix that matched the seriousness of the crime and the criminal history, if any, of the defendant. Thus, in imposing a sentence, a judge consults the matrix using the nature of the offense as one coordinate and the criminal history of the accused as the other. These two coordinates will direct the judge to a range of allowable sentences. Guidelines also include the possibility of reducing a sentence to a limited degree to encourage good behavior. The guidelines allow a judge to increase or decrease the punishment, but he or she must provide substantial and compelling reasons for doing so. Such changes are called "departures." A departure can be a change in the duration of the punishment or in the form of disposition (e.g. probation versus imprisonment) and will be based on either aggravating or mitigating circumstances. A judge's freedom to increase punishment has been limited, however, by recent decisions of the United States Supreme Court that, in the case of a jury trial, require the reasons for an increase to be presented to the jury.⁴

In 1994, voters passed Measure 11, which provides mandatory minimum sentences for twenty-six felonies against persons, when the perpetrator is fifteen years of age or older. The judge cannot reduce the sentence, but may increase it. Thus, for these specified crimes, the sentencing guidelines no longer apply. The term required by Measure 11 must be served in its entirety, with no reduction for any reason, including good behavior.

In 1997, the Legislature amended the sentencing guidelines as they applied to eleven property felonies by increasing the presumptive sentence in the case of repeat offenders.

Also in 1997, concerns among practitioners about the severity of Measure 11 led to the passage of Senate Bill 1049, which allowed judges to use the sentencing guidelines rather than the Measure 11 rules for certain offenses. The same bill added three new offenses to the Measure 11 list calling for fixed sentences. Finally, Senate Bill 1145 was enforced beginning on January 1, 1997. This bill required that those serving sentences of twelve months or less would be confined to local facilities.⁵

Now, in 2008, enough valid signatures have been obtained to place before the voters Measure 61 described above. In effect, it represents the same kind of policy for property crimes as that applied by Measure 11 to crimes against persons, specifically, lengthened terms of incarceration with no reduction or parole for any reason. The Legislature has responded by referring Measure 57 to the voters.

Effects of Measure 11

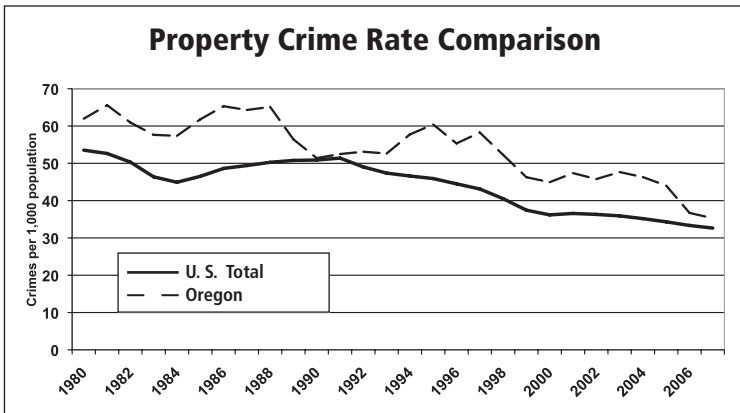
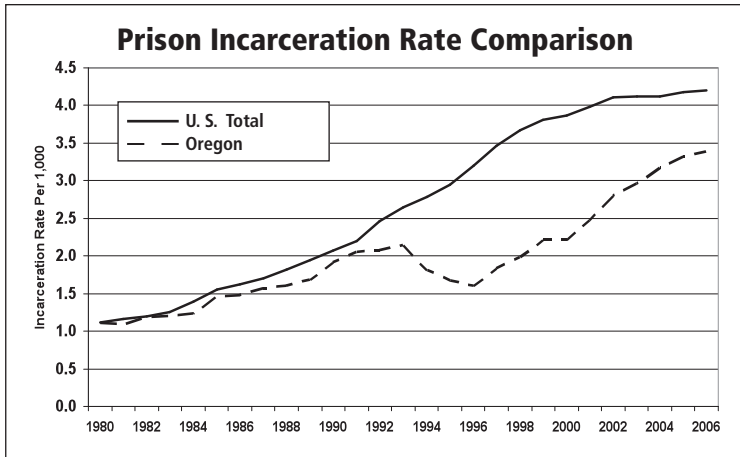
Because Measure 61 is so close in spirit and in likely practical consequences to Measure 11, the history and consequences of Measure 11 are relevant to your committee's consideration of Measure 61. In 2003, the Federal Department of Justice helped fund a peer-reviewed study of the effects of Measure 11 on Oregon's system of criminal justice, with a special focus on Multnomah, Lane, and Marion counties. The research described in this report was conducted by the RAND Corporation, and the data in this section are from that report.⁶ According to that study, Measure 11 was opposed by the majority of practitioners in the legal system, but opposition was not well organized, while support for it was well-funded and well-organized.

The RAND study suggests that Measure 11 neither completely realized the fears of its opponents nor lived up to the hopes of its advocates. By eliminating the power of judges to mitigate sentences, the measure increased the power of prosecutors. Prosecutors

questioned by those doing the study were unanimous that the sentences imposed by Measure 11 were too long for some offenses and that not all offenses eligible for charging under Measure 11 should be prosecuted as Measure 11 offenses. Since the prosecutor has some discretion in how to prosecute an offense, there has been an increase in the number of plea bargains in which the accused has chosen to accept punishment for a lesser offense in order to avoid the longer sentence prescribed by Measure 11. The number of cases sentenced under Measure 11 declined steadily after 1995, while the number under non-Measure 11 guidelines increased. One result of that development is that sentences imposed for the lesser, non-Measure 11 offenses, have tended to be longer than usual for those offenses.

At the same time, there has been a sharp increase in the number of felony offenders imprisoned who are under 18 years of age, reflecting Measure 11's requirement that offenders 15 or older be tried as adults for Measure 11 crimes. Moreover, prior to Measure 11, while most offenders with no criminal record were sentenced to probation for Measure 11 crimes, now nearly all are sentenced to prison. Thus, a higher proportion of those sentenced to prison have no prior criminal record, a change from 38 percent in 1994 to 56 percent in 1999.

The study was not able to give a definitive answer to the question of whether Measure 11 has increased public safety and reduced crime. Violent crime rates declined after the passage of Measure 11, a change that could be attributed to Measure 11 acting as a deterrent or it keeping offenders in prison where they cannot commit crimes against the public. But crime decreased generally throughout the nation in the 1990s, including in those states that did not have minimum sentencing laws. There are various theories about the reason for the decrease, but no universally accepted explanation.



Source: Oregon Criminal Justice Commission

Levels of incarceration in Oregon and the U.S.

Oregon has experienced an enormous growth in its prison population in recent years, from approximately 3,000 in 1980 to 13,624 on May 1, 2008, of whom 1,073 were women. The rate of increase has been roughly the same for male and female prisoners. During the same period, the population of the state rose from 2,633,156 to 3,690,505.⁷ Thus, while the population of the state grew by 40 percent, the prison population grew by 300 percent. In 1980, 1.21 persons per thousand

in Oregon were incarcerated, but by 2005, that number had tripled to 3.68 per thousand. At present, roughly 0.3 to 0.4 percent of the state's population is incarcerated.⁸ This percentage is somewhat lower than the national average, which is approaching 1 percent and is the highest in the world. The share of Oregon's state budget going to corrections (10.9 percent) is the highest of any state in the nation.⁹ Oregon is one of only five states whose budget for the Department of Corrections exceeds the budget for higher education.¹⁰

Official Price Tag Estimate

	2009	2010	2011	2012	Out Years	Debt	Interest (25 years)
BM 61	\$8 – 10	\$67 – 88	\$122 – 178	\$164 – 247	\$161 – 274	\$1,100 – 1,300	\$709 – 844
BM 57	\$9	\$74	\$79	\$106	\$143	\$314	\$203

Prices are in millions of dollars.

Source: Financial Impact Statement, Oregon Secretary of State

Crime rates in Oregon

Since 1980, combined property and person crimes have dropped 35 percent. Violent crime has dropped 45 percent. Currently, Oregon is 18th in the nation for the level of property crimes (1 being the highest) and 38th for violent crimes. This is a sharp change from 2005, when Oregon was the fourth highest in the country for property crimes. The rate of violent crime has fallen even faster.¹¹

FINANCIAL IMPACT OF THE PASSAGE OF MEASURES 61 & 57

Because both measures will result in keeping more people in prison and keeping them there longer, they will clearly require additional state spending to maintain and build more prisons. According to the official financial impact statement published by the Secretary of State, other costs include supervising more criminals released from prison, providing foster care for children of parents convicted under these measures, providing lawyers for defendants who cannot afford an attorney, and, in the case of Measure 57, making state grants to counties for drug treatment. As neither measure provides additional revenue to cover these costs, they would have to be paid for from the current budget.

Cost of Measure 57

According to the state's official financial impact statement, Measure 57 will cost \$9

million during the first year. The cost will then rise to more than \$143 million each year after the fourth year. The state will need to borrow a total of \$314 million from 2010 to 2017 to expand prison capacity. Repaying those amounts will cost the state \$203 million in interest over twenty-five years.¹²

Cost of Measure 61

Again, according to the state's official impact statement, Measure 61 will cost the state from \$8 to \$10 million in the first year, \$67 to \$88 million in the second year, \$122 to \$178 million in the third year, and \$164 to \$274 million for each year after that. It will require the state to borrow and repay \$1.1 to \$1.3 billion to build new prisons between 2010 and 2017. Interest on those loans will require \$709 to \$844 million over a twenty-five year period. This measure would require the state to pay local governments between \$2 and \$5 million in the first year and between \$10 and \$19 million, or 4 percent of the General Fund, each year after that.¹³ Both measures may produce additional costs for defense attorneys for defendants who cannot afford counsel, for supervising criminals after they are released from prison, and, in the case of Measure 57, for assessing the results of treatment.

Kevin Mannix, one of the chief petitioners of this measure, has been quoted in *The Oregonian* as calling these cost estimates for Measure 61 a "fantasy," but your committee

has no source for different numbers.¹⁴ He did, in speaking to your committee, point out that the state enjoyed a large increase in revenue in the past year, but a one-year increase in revenue does not adequately address the problem of the long-term costs of Measure 61. He also argued that not every prisoner need be incarcerated behind the high walls of a state prison, but could be doing useful work in a forest camp. However, as Max Williams, Director of the Oregon Department of Corrections, told your committee, the ratio of guards to prisoners needs to be higher in a work camp, which would increase rather than reduce the cost to the state.

The experience of Measure 11 does suggest that prosecutors will use the threat of a Measure 61 charge to encourage accused persons to accept punishment on a lesser charge, so that the actual cost may be less than the forecast. Still, the cost would certainly be considerable and would likely require cuts to other services.

ARGUMENTS PRO AND CON

ARGUMENTS FOR MEASURE 61

Proponents of Measure 61 have made the following arguments in favor of the measure:

- Property crime in Oregon is high in comparison with other states. Oregon ranks 18 (1 being the highest) in the level of property crime in the country.
- Measure 61 would enforce the important principle of accountability. People who commit property crimes would be held accountable for their actions.
- There is a demonstrated link between incarceration and crime rates, in that an increase in incarceration leads to a decrease in crime.
- The present sentencing guidelines for property and drug crimes are too lenient. For example, individuals can commit up to five property crimes before facing any punishment more serious than probation.
- Property crimes affect the poor disproportionately. They need the protection that Measure 61 would provide.
- The Legislature has failed to address the issue of sentencing reform. Under the stimulus of this measure, it has finally acted and produced the rival measure to this one, Measure 57. But Measure 57 does not prescribe fixed sentences for crimes. The minimum period of incarceration imposed by Measure 61 – 18 months – is the minimum necessary to achieve reformation.
- Incarceration has the effect of removing the individual from the environment that fostered his or her criminal behavior.
- Prosecutors will still be able to charge an accused with a lesser crime if enforcing the provisions of this law would be excessively harsh.

- The experience of Measure 11 shows that mandatory sentences can reduce crime.

ARGUMENTS AGAINST MEASURE 61

Opponents of Measure 61 have made the following arguments against the measure:

- Measure 61 would be far too costly. Unless another source of revenue is found, it would cause greater damage to other state services than Measure 57.
- Measure 61 provides incarceration but no rehabilitative treatment, when evidence from Oregon and other states indicates that, for non-violent drug offenses, treatment is a more effective and less expensive way to improve public safety.
- Prosecutors have used Measure 11 as a way of convincing accused persons to accept plea bargains by pleading to lesser charges. In that way, they have mitigated what was universally felt to be the excessive severity of Measure 11, while still ensuring that the offender was punished. Measure 61, however, provides a financial incentive to prosecutors to prosecute under its provisions, because counties are to be compensated for housing prisoners convicted under Measure 61.
- Other states that have experimented with mandatory minimum sentencing laws have been forced, by the sheer expense of incarcerating the resulting large number of prisoners, to rethink their system of punishment and to turn to methods other than imprisonment. Measure 61 would send Oregon down a similar road that other states have been forced to abandon.

- Because sentences under Measure 61 cannot be reduced for any reason, there is no way for the system to reward good behavior or evidence of reform. This will only make more difficult the task of those charged with managing inmates.
- The level and downward trend of criminal activity in Oregon, including property crimes, do not indicate that the state is facing a crisis that would warrant so drastic a change in the severity of sentencing as that proposed by Measure 61.

ARGUMENTS FOR MEASURE 57

Proponents of Measure 57 have made the following arguments in favor of the measure:

- Because past experience and recent polling indicate that voters will likely vote in favor of anti-crime legislation, Measure 57 will ensure that property crimes will be dealt with more severely while still avoiding the cost and other harmful effects of Measure 61.
- Measure 57 will provide treatment for some drug related crimes, thereby reducing the financial and social costs of imprisonment.
- Measure 57 will be less costly than Measure 61 during a time when the revenues for the state will probably decline and the need for other human services will increase.
- Measure 57 will provide judges more authority in sentencing, whereas under Measure 61 the discretion will reside more with prosecutors.
- Measure 57 will stiffen the penalties for some first-time offenses that are widely considered too soft.
- Measure 57 allows the reduction of sentences for good behavior, thus encouraging

reformation while helping those charged with managing the prison population.

ARGUMENTS AGAINST MEASURE 57 (IN FAVOR OF MEASURE 61)

Proponents of Measure 61 have made the following argument against Measure 57:

- Measure 57 will result in the release of perpetrators who would be incarcerated under Measure 61.

ARGUMENTS AGAINST BOTH MEASURES 57 & 61

Opponents of both Measures 57 and 61 have made the following arguments against the measures:

- Both measures increase costs for the Department of Corrections, which can be met only by cutting other state services. Many or most of those services, such as courts, state police and higher education, are already under-funded by national standards. Many of these services are also important for the prevention of crime; adequately funding them makes Oregon a better place to live.
- Because more women than men commit identity theft, both measures will sharply increase the number of women incarcerated. That will lead to a problem for the Department of Corrections in providing housing for the additional number of women incarcerated and will also increase the number of children who will require foster care. Because both measures will take money from the general fund, they will likely cause a reduction in the funding for the Department of Human Services, which manages the foster care system.

DISCUSSION

DO LAWS IMPOSING LONG MINIMUM SENTENCES REDUCE CRIME?

According to a study by the Pew Memorial Trust, the growth in the nation's prison population has not been driven by an increase in the crime rate but rather by legislated increases in the severity of punishment. In Florida, for example, "get-tough on crime" laws were followed by an increase in prison population but no greater or lesser decline in the crime rate than, for example, New York, where the prison population has decreased.¹⁵

That is not to say that incarceration cannot help to reduce crime rates. A recent study by the Washington State Institute of Public Policy cited by the Oregon Criminal Justice System Report to the Legislature says that, for Oregon, a 10 percent increase in the incarceration rate led to a 2.6 percent decrease in the crime rate. The effect is larger for violent crime. But the law of diminishing returns applies to incarceration. That is, as the incarceration rate goes up, after a certain point, the rate of reduction in crime goes down.¹⁶ The economic significance of this fact is discussed later under "Economic Impact of Incarceration."

IMPACT OF INCARCERATION V. DRUG TREATMENT ON RECIDIVISM

About 93 percent of those incarcerated in Oregon will be released and will return to society.¹⁷ The recidivism rate (the rate at which those released commit more crime) is one measure of the effectiveness of incarceration as a means of reform. For Oregon, the recidivism rate is about 31 percent, distinctly better than the national average of about 47 percent.¹⁸

Because a high percentage of property crimes are committed to support addiction, your committee has looked for evidence to see if treatment for addiction would be a reasonable alternative to incarceration, in terms of both cost and public safety.

In 1991 Multnomah County instituted the STOP (Sanction Treatment Opportunity Progress) Drug Diversion program to reduce the backlog of drug related cases and to encourage treatment of those convicted of first-time drug offenses. The program was expanded in 1995 to address a larger population and to provide access to health, mental health, family intervention and aftercare services. In 1998 the program was evaluated to determine its effectiveness for participants as well as its cost effectiveness for taxpayers.¹⁹ Researchers measured success partly by examining the subsequent arrest record for participants compared with a similar group of non-participants.

Participants were divided into two groups: graduates and those who participated in but did not complete the program. In general, while graduates of the program had the best record, even those who completed only part of the program had a much better record than non-participants. In a two-year period, these two groups of participants in general had 72 percent fewer subsequent drug arrests than non-participants. More specifically, of 100 graduates, 7 were arrested on drug charges, while, of 100 non-participants, 31 had subsequent arrests. In the estimation of the researcher, the annual savings for Multnomah County taxpayers was \$10.2 million.

More recently, in 2008, the Portland State University Regional Research Institute for Human Services published a study on the link between drug abuse and crime and the effectiveness of treatment in changing those behaviors.²⁰ It examined the outcome of two of Central City Concern's treatment programs: the Mentor program and the Alcohol and Drug-Free Program. The study showed that the link between drug abuse and crime

is very clear: 93 percent of the participants had committed crimes and 76 percent said that their crimes were to support their drug habit. Almost half had bought and sold drugs. Their drug habits cost them on average \$206 a day. According to this study, their activities cost the City of Portland at least \$2 million a year.

The group studied was relatively small, 87 individuals, and somewhat older than many addicts (average age 42). These facts may limit the validity of the findings. Still, the results of treatment were generally positive. There was a 93 percent reduction in the number who committed crimes. The average number of "clean" days was 325 for all participants. They credited their success to having safe housing, peer support, structured drug treatment, and the compassion they felt from others.

In November 2000, California voters approved a ballot measure (Proposition 36), which requires certain non-violent drug offenders to enter treatment programs instead of prison. Early reports of a similar law passed in Arizona in 1996 have been positive, and other state diversion programs appear to be working as well.²¹

ECONOMIC IMPACT OF INCARCERATION

Keeping persons in prison is expensive. The cost per inmate in the Oregon system is \$77.78 per day,²² and, as is stated above, the cost of the Department of Corrections is the largest item in the state's budget. The cost

for each household in Oregon for the entire criminal justice system, including corrections, courts, and state police, has risen since 1985 from \$632 to \$1,133 in constant dollars.²³ By far the greatest cost increase has been in the Department of Corrections, while the cost of state police has actually declined 19 percent.²⁴ That reflects the fact that the number of state police per population is now 50 percent of what it was in 1991 and is the lowest in the country.²⁵ The costs of the criminal justice system are paid directly from the state general fund, so that any increase in funding,

"The costs of the criminal justice system are paid directly from the state general fund, so that any increase in funding, absent additional resources, must come from cuts to other state services. Some of these services, such as education and human services, have a role to play in the prevention of criminal activity."

absent additional resources, must come from cuts to other state services. Some of these services, such as education and human services, have a role to play in the prevention of criminal activity.

Of course, there is an economic as well as a social benefit in preventing criminals from committing crimes by incarcerating them. The cost of property crimes is obvious, but vio-

lent crimes also cost society, in the form of increased medical expenses, lost productivity, and survivor counseling. So preventing crimes does produce a savings to society. The Washington study and the Oregon Criminal Justice Commission report mentioned above put a dollar figure on the costs to determine how society benefits by incarcerating criminals. These numbers suggest that the law of diminishing returns has set in, as Oregon and Washington have incarcerated more and

more persons. Specifically, for Oregon, every additional dollar spent on incarceration in 1994 produced \$3.31 of benefit to the state in the form of avoided expense, whereas in 2005, each additional dollar produced only \$1.03 in benefit.

The figures for Washington are most interesting for this report because they are broken down among violent, property, and drug crimes—and the ballot measures addressed in this document are concerned with the latter two. Those figures show that, in the same period, while return of a dollar invested in incarceration in Washington went from \$9.57 to \$4.35 for violent crimes, for property crimes it went from \$2.36 to \$1.10, and for drug crimes from \$0.37 to \$0.35.²⁶

On the last issue, drug crimes, the study concluded that it costs taxpayers more to incarcerate drug offenders than the value of the crimes avoided and that “well researched and well implemented rehabilitation and prevention programs give taxpayers a better return than increasing the incarceration rate for drug-involved offenders.” The Oregon Criminal Justice Commission came to a similar conclusion: “While incarcerating property offenders is very close to breaking even, incarcerating drug offenders is not cost effective.”²⁷ A 1997 RAND study also concluded that “mandatory minimum sentences are not justifiable on the basis of reducing cocaine consumption, cocaine expenditures, or drug-related crime.”²⁸

The steady increase in the number of people incarcerated has in many states put a severe strain on state budgets and has forced states to cut back on other services. A few states, notably California, Kansas and Texas, have reversed the trend by finding ways of addressing crime other than imprisonment.²⁹ In California, Proposition 36 mentioned above, by putting 24,000 non-violent drug

offenders in treatment programs, reduced the number of prison beds needed by 11,000. It also produced further savings by reducing the number of prisoners ending up in parole supervision programs. It is possible that this initiative was stimulated by a report by a 1992 CALDATA (Research by the California Department of Alcohol and Drug Programs) report, which found that for every dollar spent on treating substance abuse, \$7.00 was saved.³⁰

MEASURES 61 & 57 AND THE INITIATIVE SYSTEM

Measure 61 illustrates some of the problems with the initiative system that were pointed out in City Club’s 2008 report, “Making the Initiative Work for Oregon.” Legislation requires taking into account differing and even conflicting points of view. It also requires investigation of the relevant facts and consulting with those who have relevant knowledge. That is why most legislation involves compromise. It can be a messy and unattractive process. As Otto von Bismarck said, “If you love the law or sausages, don’t watch either of them being made.” The initiative process avoids compromise. Too often, initiatives represent one side of a many-sided issue. Such is certainly the case with Measure 61. Kevin Mannix testified to your Committee that the measure’s primary goal is accountability. That is certainly a legitimate goal, and Measure 61 would achieve it.

The justice system, however, has other goals. There is the matter of restraint. A person is restrained from committing crimes while in prison, and to that extent, Measure 61 provides it. But once that person returns to society, as most do, the restraint is gone unless it is internalized. That is why the issue of rehabilitation is so crucial to the safety of society, and, from that point of view, Measure 61 fails for all the reasons that have been

shown in this study. For many of the crimes covered by this measure, treatment has a better record than incarceration in reducing recidivism.

That Measure 57 is a better measure is a consequence of its having been developed in a cooperative process involving the Legislature and stakeholders. So, the experience of these two measures tends to support the recommendation of the 2008 City Club report that all initiatives qualifying for the ballot should receive legislative review.

MEASURES 61 & 57 AND THE CURRENT SITUATION IN OREGON

The timing of both these measures is strange given the current context. One might infer from reading them that Oregon is suffering from a rising crime rate, whereas, as we have seen, the opposite is the case. Measure 57 could be seen as responding to an emergency, but the real emergency is Measure 61. Moreover, both measures are presented at a time when other states, having experienced the effect of similar minimum sentence laws, are backing away from them and looking for more economical and more effective ways of dealing with the same sort of crime. It seems singularly unwise not to benefit from the experience of other states.

In Oregon there are genuinely urgent needs that would be made worse by the enactment of these measures. Ever since the property tax limitations in Measure 5 were passed, some of Oregon's state services have been in an almost permanent state of budgetary

crisis. The reduced size of the state police force has been mentioned. Another is higher education. Salaries for faculties in the Oregon University System have been for years near the bottom in comparison with similar systems. Other services, such as K-12 education, the Oregon Health Plan, and foster care, together with the state's infrastructure, could all be adversely affected by spending more of the state's limited resources on corrections. It makes little sense to divert more money to corrections, when its share is the highest in the nation, and away from state services whose share of the state budget are among the lowest in the nation. It makes still less sense when there are more economical ways of getting better results.

SENTENCING POLICY

One reason for preferring Measure 57 to Measure 61 is that the former allows judges a degree of discretion in deciding sentences, provided the judge can offer a rational justification for the discretionary sentence. Rational sentencing takes into account the particularities of the case, including the severity of the crime and the character and history of the perpetrator.

Oregon's sentencing guidelines try to achieve exactly that by providing a presumptive range of sentences, but allowing departures under appropriate circumstances. Measure 61 allows a judge only to increase a sentence, though that power has been limited by the United States Supreme Court in the case of a jury trial.

In testifying before your committee, Measure 61's chief petitioner defended its apparent

"The timing of both these measures is strange given the current context. One might infer from reading them that Oregon is suffering from a rising crime rate, whereas, as we have seen, the opposite is the case."

inflexibility by referring to the history of Measure 11 and the way that its supposedly mandatory sentences were not imposed because prosecutors used the threat of a Measure 11 sentence to convince the accused to accept punishment for a lesser charge. That this happened is confirmed by the RAND analysis mentioned above, and it has certainly made Measure 11 less severe in practice than it was in design. To say that, however, is to acknowledge, first, that Measure 61 will not deliver the certainty of sentencing that it promises and second that such certainty is not desirable. In the opinion of your committee, as between the judge and the prosecutor, it is better that the judge, who is professionally disinterested, retain the power to adjust the punishment to the facts of the particular case. That is particularly true given the evidence showing that judges have exercised their power to grant downward departures from the sentencing guidelines in less than 10 percent of the cases.³¹ In other words, in the vast majority of the cases, judges are imposing sentences within the presumptive range set forth in the guidelines.

CONCLUSIONS & RECOMMENDATIONS

UNANIMOUS CONCLUSIONS REGARDING MEASURE 61

- Measure 61 has been projected to cost the state between \$161 million and \$274 million a year. This cost would have to be met by cutting other state services.
- There is good evidence that treatment is more cost-effective than incarceration in preventing drug-related crimes.
- Other states have abandoned mandatory minimum sentences for property crimes as prohibitively expensive.
- Oregon already spends a larger share of its general fund on corrections than any other state.
- The rate of property crime in Oregon is already in decline, without this measure.
- Incarcerating more persons will increase certain social problems while taking money from those agencies that address those problems.

UNANIMOUS RECOMMENDATION REGARDING MEASURE 61

Your committee unanimously recommends a “NO” vote on Measure 61.

Respectfully submitted,

Jim Blackwood, Jr.
William Connor
John Cooper
F. Jean Hart
Heather Kmetz
Charles Mitchell
Alexander Sachon
Ethan Scarle
Richard York
Chris Zahas
David Aman, chair

John Horvick, research adviser
Tony Iaccarino, research & policy director

MAJORITY CONCLUSIONS REGARDING MEASURE 57

- Measure 57 has been projected to cost ultimately \$143 million a year. This cost would have to be met by cutting other state services.
- Although Measure 57 provides for treatment for drug addiction, it also calls for increased incarceration. There is good evidence that treatment would be more cost effective.
- Oregon already spends a larger share of its general fund on corrections than any other state.
- The rate of property crime in Oregon is already in decline, without this measure.
- Incarcerating more persons will increase certain social problems while taking money from those agencies that address those problems.

MAJORITY RECOMMENDATION REGARDING MEASURE 57

The majority recommends a “NO” vote on Measure 57.

Respectfully submitted,

William Connor
John Cooper
F. Jean Hart
Charles Mitchell
Ethan Scarle
Richard York
David Aman, chair

MINORITY CONCLUSIONS

While agreeing with your entire committee that Measures 57 and 61 are both flawed public policy, the minority concludes that a principled stand against both measures risks a victory for Measure 61, with its unacceptable consequences.

es for Oregon’s criminal justice system, criminal rehabilitation and state budget.

Oregon has a long history of the initiative process driving its criminal justice philosophy and design. Measure 61 seeks to capitalize on the electorate’s historical bias toward accountability-based justice. In 1994, Measure 11, which initiated mandatory minimum sentences for violent crime, garnered 65 percent of the vote. In 2000, Measure 94, an attempt to repeal Measure 11, was opposed by 73 percent of the voters.

In some part, the appearance of Measure 61 is the result of the Legislature’s failure to lead the public debate on criminal justice, rehabilitation and property crimes. According to testimony by both Representative Greg Macpherson and Kevin Mannix, a measure costing \$45 million over two years was allowed to die in committee. Had the Legislature balanced financial considerations with the reality of the publicly-favored accountability philosophy, we may have avoided the considerably higher financial impact of both Measures 57 and 61.

All public policy is subject to the dual influences of politics and compromise. Having failed to address property crimes in any meaningful way before the appearance of Measure 61, the Legislature was forced to create a thoughtful and politically viable response. This legislative referral reflects the sound political judgment that the voters would support Measure 61 if no alternative were offered. That Measure 57 is better legislation is a consequence of its having been developed in a cooperative process between the Legislature and stakeholders, as recommended in the 2008 City Club report on reforming the initiative, referendum and referral systems in Oregon.

The Legislature’s referral of Measure 57 creates a unique opportunity for the voters to choose between two criminal justice philosophies: an expensive, completely punitive design and a more measured approach that attempts to address drug addiction, an overwhelming cause

of property crimes. Measure 57 also attempts to mitigate the financial impact of an entirely punishment-based approach for property crimes.

Advocates for both initiatives agree that there will be no meaningful campaign against both measures. The case against either measure will only be made as part of the advocacy for one measure or the other. Should the voters approve both measures, the one with the most votes will become law.

A broad coalition including state legislators, the governor, future Attorney General John Kroger, law enforcement, unions and public interest organizations will vigorously support a “yes” campaign for Measure 57. State Representative Macpherson, a Measure 57 co-author, characterized a “no” vote on both measures as the equivalent of a “yes” vote for Measure 61.

In short, the minority has reached the following conclusions:

- Measure 57 represents a reasonable compromise between the public’s desire for holding perpetrators responsible for their actions and the need for a less expensive and less simply punitive system.
- Without Measure 57, there is a strong probability that voters will approve the much more expensive Measure 61. Thus a “no” vote on Measure 57 may be in effect a “yes” vote on Measure 61.
- Measure 57 recognizes the value of treatment for drug addiction and provides for it.

MINORITY RECOMMENDATION

The minority recommends a “YES” vote on Measure 57.

Respectfully submitted,

Jim Blackwood, Jr.
Heather Kmetz
Alexander Sachon
Chris Zahas

WITNESSES

John Connors, Multnomah County Director, Metropolitan Public Defender's Office
Mark McDonnell, Senior Deputy District Attorney, Multnomah County District Attorney's Office
Greg Macpherson, State Representative, State of Oregon; Chair, House Judiciary Committee
Kevin Mannix, Former State Representative, State of Oregon; Chief Petitioner, Ballot Measure 61
Jean Maurer, Presiding Judge, Circuit Court for the State of Oregon, Multnomah County
Craig Prins, Executive Director, Oregon Criminal Justice Commission
Scott Taylor, Director, Multnomah County Department of Community Justice
Max Williams, Director, Oregon Department of Corrections

CITATIONS

- 1 Testimony before your committee by Greg Macpherson, Oregon State Representative and House Judiciary Committee chair.
- 2 Oregon Constitution, Art. I, Sec.15.
- 3 City Club of Portland, "Report on Ballot Measure 61," October 1998.
- 4 *Apprendi v. New Jersey* 530 US 466 (2000); *Blakely v. Washington* 542 US 296 (2004).
- 5 This history summarizes the account in City Club of Portland's "Report on Ballot Measure 61" in 1998, which was corroborated by several witnesses before your committee, notably Jean Maurer, Presiding Judge, Circuit Court for the State of Oregon, Multnomah County; and by the Oregon Criminal Justice Commission's report, "The Development of Oregon's Sentencing and Corrections Policy."
- 6 Nancy Merritt et al., "Oregon's Measure 11 Sentencing Reform: Implementation and System Impact," RAND Public Safety and Justice for the National Institute of Justice, 2004.
- 7 Pew Memorial Trust, "One in 100 Behind Bars in America," 2008.
- 8 Oregon Criminal Justice Commission, "Report to the Legislature," January 2007.
- 9 Pew Memorial Trust, "One in 100 Behind Bars in America," 2008.
- 10 J.J. Hermes, "Five States Spend More on Prisons than Colleges," *Chronicle of Higher Education*, March 14, 2008.
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- 12 Financial Impact Statement, Oregon Secretary of State.
- 13 *Ibid.*
- 14 Janie Har, "Either anti-crime measure will cost over \$1 billion, state says," *The Oregonian*, August 8, 2008.
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- 16 Oregon Criminal Justice Commission, "Report to the Legislature," January 2007.

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- 18 Ibid.
- 19 Michael Finigan, "An Outcome Evaluation of the Multnomah County S.T.O.P. Drug Diversion Program," NPI Research Inc, 1998.
- 20 Heidi Herinckx, "Criminal Activity and Substance Abuse Study, Central City Concern: Mentor and ADFC Housing Programs," Regional Research Institute for Human Services, Portland State University, January 2008.
- 21 Allison Colker, "California's Proposition 36 and other State Diversion Programs: Moving Drug Offenders out of Prison and into Treatment," December 31, 2004.
- 22 Presentation to your committee by Max Williams, Director, Oregon Department of Corrections.
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- 24 Ibid.
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- 28 Jonathan Caulkins et al., "Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money," RAND Monograph Report, 1997.
- 29 Pew Memorial Trust, "One in 100 Behind Bars in America," 2008.
- 30 Cited in "Multnomah County Public Safety: A Brief Review of National, State, and Local Crime Trends," 1999.
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NOTES

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